SUPREME COURT, U. S.
FILED
JUN 23 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 289

JOSE ARAMIS ALVAREZ, Individually, and in behalf of all those similarly situated,

Petitioner,

vs.

PAN AMERICAN LIFE INSURANCE COMPANY,

Respondent.

AUGUSTIN GOYTISOLO RECIO, Individually, and in behalf of all those similarly situated,

Petitioner,

vs.

PAN AMERICAN LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOSEPH A. McGOWAN
823 City National Bank Bldg.
Miami, Florida 33130

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Federal Rule Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	17
Index to Appendix	App. i
Appendix	App. 1

CITATIONS

	Page
Davies v. Corbin, 112 U.S. 36 (1884)	15
Hansberry v. Lee, 311 U.S. 32, 43 (1946)	14
Lion Bonding & Surety Co. v. Karatz, 260 U.S. 77 (1923)	13
Pinel v. Pinel, 240 U.S. 594 (1916)	13
Shields v. Thomas, 17 Howell 3 (1855)	15
Troy Bank v. Whitehead & Co., 222 U.S. 39 (1911)	14
Federal Rules of Civil Procedure:	
Federal Rule of Civil Procedure 23 (1966)	2-17
Miscellaneous:	
2 Barron & Holtzoff, Federal Practice & Procedure (Wright ed.), *pkt. prt. supp.*, ch. 23, 1966	7, 8, 9, 12
Cohn, The New Federal Rules of Civil Procedure, 54 Geo.L.R. 1204, 1213-1218 (1966)	6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. _____

JOSE ARAMIS ALVAREZ, Individually, and in behalf of all those similarly situated,

Petitioner,

vs.

PAN AMERICAN LIFE INSURANCE COMPANY,

Respondent.

AUGUSTIN GOYTISOLO RECIO, Individually, and in behalf of all those similarly situated,

Petitioner,

vs.

PAN AMERICAN LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on March 27, 1967.

CITATIONS TO OPINIONS BELOW.

Petitioners filed these class actions in the United States District Court for the Southern District of Florida. Upon filing of the complaint, Respondent Insurance Co. moved to dismiss and for Summary Judgment. These motions were severally denied with opinion by the District Court in an unreported opinion, dated April 9, 1965, reprinted in the Appendix, *infra*, at App. 1. (R. 222-232 [#22902]). Thereafter, Default was entered against the Respondent on May 12, 1965 (R. 240 [#22902]). However, both causes were, on suggestion of lack of jurisdiction, dismissed (R. 240 [#22902]). Appeal was taken to the United States Court of Appeals for the Fifth Circuit. That court affirmed in an opinion dated March 27, 1967, reprinted in the Appendix, *infra*, App. 10. The opinion has not been assigned an official West citation as of the date of printing of this Petition, but was reported in 35 LW 2597.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 27, 1967, *infra*, App. 10. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED.

I. Whether Amended Federal Rule of Civil Procedure 23 has abolished the distinctions that existed as to class actions, so that representatives of a class may now aggregate the entire class's claims for jurisdictional purposes, provided that the requisites which insure due process and fair representation of all parties concerned, as set forth in Amended Rule 23(a) and (b), are shown to exist.

II. Whether the United States Court of Appeals for the Fifth Circuit erred in construing Petitioners' suits as "spurious" class actions, rather than "true" class actions under the meaning of Old Rule 23(a)(1).

FEDERAL RULE INVOLVED.

Both of these actions involve a construction of Federal Rule of Civil Procedure 23, as amended July 1, 1966. The Rule is reprinted in its entirety in Appendix, *infra*, App. 22.

STATEMENT.

These suits were brought in the United States District Court for the Southern District of Florida as class actions by two Cuban refugees, residing in the United States, against Respondent, an insurance company incorporated and with its principal place of business in Louisiana. Respondent did business in the Republic of Cuba prior to the advent of the Castro government.

Essentially, the class consists of the policyholders of the Respondent Insurance Company who were issued their policies while residing in, or represented to be nationals of Cuba prior to the advent of the Castro government.

The *Recio* class members seek an adjudication of their rights in a Fund established pursuant to the terms of the policy issued to each of them. That Fund is composed entirely of monies, and increments earned by such monies, paid by nationals of Cuba and other Latin American countries in compliance with a so-called Perseverance Provision contained in the life insurance policies purchased. (The Perseverance Provision is reprinted in the Appendix, *infra*,

App. 20, and also appears in R.71 [#22902], R.19-21 [#22761].)

The Perseverance "bonus" arrangement is a distinct and separate provision from any other coverage in the policy. Persons desiring to participate in the Perseverance Fund qualify, under the terms of the insurance policy, by performing two conditions: (1) That they contribute an annual sum, exclusive from the regular premium, for a specified number of years, for each and every year in such period; and (2) That they survive, or "persevere", (hence the title, "Perseverance Fund") for the prescribed number of years. At the expiration of the specified period, the Fund, together with the increments realized thereon, would be divided, *per capita*, amongst the then living survivors of the class composed of those who purchased policies in the same year, and who continued payment for the entire period of time. Respondent has refused to distribute the Perseverance Fund on various grounds.

Thus, Petitioners in *Recio* have sought these remedies: To impress a constructive trust on the Perseverance Fund; To have appointed a receiver to take charge of the Fund; To have made an accounting as to the amount of the Fund; and To be granted judgment against respondent for any monies converted or improperly paid plus attorney's fees.

The *Alvarez* class members seek not only an adjudication of the above rights to the Perseverance Fund, but also an adjudication of the rights of the class in all policies issued by the Respondent to such class.

Jurisdiction was predicated on diversity and the contention that the amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

It was and is the contention of Petitioners that these suits are "true" class actions, whether construed under Old Rule 23 or Amended Rule 23, and thus the claims of the entire class should be aggregated to establish the jurisdictional amount.

The Court of Appeals has refused to allow the aggregation of the class's claim to establish the jurisdictional amount and has dismissed the action for lack of jurisdiction. Basically, that court held that the suits were not "true" class actions under the concept of Old Rule 23 or Amended Rule 23, the latter of which the court below recognized as effective on the case *sub judice*. The Court of Appeals held that since there were no expressed words in the Amended Rule 23 regarding the aggregation of claims for jurisdictional purposes, such question is " . . . a question which addresses itself to the Congress or *the Supreme Court.*" (Emphasis added.) 35 LW 2597.

REASONS FOR GRANTING THE WRIT

I. The intention of the framers of Amended Rule 23 has been to abolish the effects of Old Rule 23 and implement in their place, procedural guideposts meant to further the original advantage of the class action—i.e., the avoidance of multiple lawsuits in the same controversy when adequate and fair representation can be shown.[1] These

---

[1]The criticisms of legal commentators have been aimed at substantially the same faults of Old Rule 23, and have proposed similar corrections. A representative but not exhaustive list of the leading articles and commentaries dealing with the subject is: *Hansberry v. Lee*, 311 U.S. 32, 43 (1948); 2 *Barron and Holtzoff, Federal Practice and Procedure (Wright ed.)*, pkt. prt. supp., ch. 23 (1966); *Chafee, Some Problems in Equity*, pp. 199-282 (1950); *Cohn, The New Federal Rules of Civil Procedure*, 54 *George. L. R.* 1204, 1213-18 (1966); *Comment by the Advisory*

opinions are consistent and identical in their essential content. A brief synopsis, which succinctly and accurately summarizes the motivation behind the complete overhaul of Rule 23, is stated by Professor Cohn, chairman of the Committee of Federal Rules and Procedure, and chairman of the Federal Appellate Rules Committee, in his article appearing in 54 Geo. L.R. 1204 (1966):

> The current amendments move closer to what Mr. Justice Goldberg termed 'the aims of a liberal, non-technical application' of federal procedural rules, rules that are designed to place before the court the actual substantive issues in the case with the minimum amount of formal procedural restrictions needed to ensure fair and orderly proceedings . . . [In New Rule 23] overly formal classifications have been rejected for pragmatic considerations. *The present trichotomy of true, hybrid, and spurious class actions is put to rest.* It should be noted that the amended rule abandons any attempt to draw distinctions between joint, common, secondary, or several rights, thereby abandoning the common-law legalisms that were brought into federal procedure by the old rule. (Emphasis supplied)

Committee, 1966 Amended Federal Rules of Civil Procedure, ch. 23 (1966); *Holtzoff, A Judge Looks at the Rules, 1966 Amended Federal Rules of Civil Procedure*, (West ed.), p. 19 (1966); *Kalven and Rosenfield, The Contemporary Function of the Class suit*, 8 *U. of Chi. L.R.* 684 (1941); 1 *Moore's Federal Practice* (2d ed.), pkt. part. supp., ch. 23 (1966); Note: *Developments in the Law; Multiparty Litigation in the Federal Courts*, 71 *Harv. L.R.* 874, 934-71 (1958); Note; *Federal Class Action: A Suggested Revision of Rule 23*, 46 *Colum. L.R.* 818, 823 (1946); *Weinstein, Revision in Procedure: Some Problems in Class Actions*, 9 *Buff. L.R.* 433 (1960).

Judges Barron and Holtzoff, whose roles in the creation of the Federal Rules of Civil Procedure need no review, felt that " . . . in view of the complete redrafting of Rule 23 which was adopted in 1966, the text (regarding class actions) in the main volume is largely obsolete." 2 **Barron and Holtzoff,** *supra,* at § 562, p. 76.

The Amended Rule states four prerequisites to a class action. (See Appendix, *infra,* App. 22, for Amended Rule 23 in entirety.) Petitioners contend that their position qualifies in each regard, not only in the technical sense, but in fulfilling the spirit behind each of the criteria in 23(a),. i.e.:

> "23(a)(1): the class is so numerous that joinder of all members is impracticable [the number of subscribers to the Perseverance Fund in 1942 was 5000, R. 255 [#22902], and the number of survivors is not yet determined];
>
> 23(a)(2): there are questions of law or fact common to the class [all of the members claim through the same contract right, i.e., the Perseverance Provision in their 1942 policy and the policy rights themselves.];
>
> 23(a)(3): the claims or defenses of the representative parties are typical of the claims or defenses of the class [the claims of petitioners are identical to those of each and every class member];
>
> 23(a)(4): the representing parties will fairly and adequately protect the interests of the class [Petitioners have prosecuted this action through every available state and federal court.]."

Commenting on the effect of the express words of the Amended Rule, Judges Barron and Holtzoff indicated the probable solution to the very issue presented in the case *sub judice:*

> *There is no such thing as a 'spurious' class action under the 1966 amendment of Rule 23*, and that a past action was or was not maintainable as a class action under the former rule has no significance in determining whether it can be maintained as a class action under the new rule. (Emphasis provided.) 2 **Barron and Holtzoff**, *supra*, at § 562.3, p. 77.

> Amended Rule 23 does not purport in terms to have any effect on jurisdiction and venue, and Rule 82 disclaims any such effect for the rules generally. Yet the new rule will require reconsideration of the answers which have been worked out under the former rule to questions of jurisdiction and venue. *Id.* at § 569, p. 89.

Recognizing further that the question of jurisdictional amount may present the most difficult problem regarding an expanding of federal jurisdiction under Amended Rule 23, the commentators and reviewing courts have turned their attention to the essential reasons for the amendment. Simply stated, the problem is: Will an aggregation of the individual claims destroy the fair representation that Amended Rule 23 attempts to insure?

Amended Rule 23(c)(3), governing the judgment rendered in class actions like the case at bar, states that such judgment " . . . shall include and describe those whom

the court finds to be members of the class." Since an action qualifying as a class action under Amended Rule 23 extends its judgment to all members of the class, the intention seems to be to permit a class action as long as the risk of inconsistent or varying adjudications, which might establish incompatible standards of conduct for the party opposing the class, are avoided. See 2 **Barron & Holtzoff,** *supra*, at § 572, p. 95. This Court should note the effect of denying Petitioners jurisdiction to determine the rights of their class in federal court—i.e., individual class members would be then forced to seek separate adjudications in the state courts which are convenient and have jurisdiction over respondent.

Thus, the ultimate effect of dismissing any but all persons in the class is to: (1) promote multiplicity of suits in the state and federal courts, depending on the amount claimed by each individual, and (2) confront Respondent with many and varying adjudications of its obligations to the class members.

The Amended Rule clearly aims to avoid such time consuming and unnecessary litigation. The facts here especially are congruent with the situation anticipated by Amended Rule 23 because:

(A). the claims of all the class members are equal;

(B). the danger of depriving Respondent of its due process of law by way of inconsistent claims is impossible since all claims are of the same amount and origin;

(C). the danger of depriving absentees of their day in court is equally untenable since all the class members'

rights are exactly alike with regard to the Perseverance Fund and policy rights and notice to absentees is expressly anticipated by Amended Rule 23(d);

(D). Petitioners' efforts have been shown to attempt to achieve the maximum benefits for the classes they represent.

The court below has indicated its acceptance of the position taken by the express words of the Amended Rule 23. That court's hesitation in allowing Petitioners jurisdiction was based on the stated reason that without the *expressed abolition* of the docrine which forbade "spurious" class actions from aggregating the claims of the entire class, such doctrine must remain in force. The Court of Appeals has also called for an answer to that question by either an act of Congress *or an opinion from this Court.* Assuming, *arguendo,* that Petitioners' circumstances did place them in the role of "spurious" class representatives (See **REASON II,** this Brief, to the effect that Petitioners are presenting a "true" class action) the Amended Rule nevertheless encourages federal adjudication of those claims shown to satisfy the expressed requirements that were set out to assure effective application of the class action principle. See *Cohn, supra;* **Chafee,** *supra.*

Petitioners summarily submit that the facts indisputably determine their position to be truly representative of the class, and as such, entitled to assert the amount of the class's claims against the Respondent. The Court must note that an adjudication with regard to the withheld Perseverance Fund in *Recio* will determine the disposition of the *entire $6 million,* which is the true amount in controversy, since regardless of the ultimate disposition of that

Fund after the class's rights in it are determined, the fact remains that *the entire fund will be disposed and the subsequent proportions are not relevant to the question of jurisdictional amount. Davies v. Corbin*, 112 US 36 (1884); *Shields v. Thomas*, 17 Howell 3 (1855); (discussed *infra*, p. 15) and numerous cases based thereon.

Overlooked by the court below is the fact that Recio himself may well be the only survivor of his class and thus entitled to the entire Perseverance Fund. This determination has not been made yet, and provisions exist in Amended Rule 23(d) to account for absentee class members at the conclusion of the class action. Nevertheless, to deny Recio the chance to adjudicate his rights on the basis of jurisdictional amount may be working an essential injustice to him since his claim might very well meet that amount.

Petitioner in *Alvarez* has sought the same remedies with regard to the Perseverance Fund. Moreover, Alvarez and the class he represents are seeking a final, binding determination of their respective rights under the policies issued to them. The Court of Appeals has allowed one member of the class to proceed (R.84, 85 [#22776]), but apparently precluded him from representing the class. The effect of this is to break up the class into those whose claims exceed $10,000.00 and yet, at the same time, bar a determination of the rights of those who do not meet the monetary test. To so hold actually violates the whole theory of class actions.

The chief concern in the class action situation is whether the judgment will fairly bind the absentees and not work an injustice on the party opposing the class.

"This determination should turn on how closely the class is associated, the degree of notice to the absentees, and the adequacy of representation, rather than on an unworkable mechanical test." 2 Barron & Holtzoff, *supra*, at §562.

To allow the holdings of the Court of Appeals to remain in force is to substitute an outdated, perfunctory test for a justiciable consideration of the issues presented. Petitioners' purposes meet every test of legal sufficiency with regard to the class action and should not balance on any vagaries that the outmoded labellings of "true", "hybrid", and "spurious" impose.

* * * *

II. It is conceded by the Court of Appeals that despite the fact that this action was pending when the Amended Rules became effective on July 1, 1966, such Amended Rules were applicable to the case *sub judice*. Nevertheless, the court denied jurisdiction for want of the jurisdictional amount. The reason given by the court was that unless the Amended Rule has somehow abrogated the aggregation principle, the Petitioners (Appellants below) would not be able to combine the class's claims in order to meet the jurisdictional amount. 35 LW 2597. As noted before, *supra*, p. 11 the court below has overlooked the fact that in *Recio*, Recio himself may well be the only survivor and thus entitled to the entire Fund, something which won't be known until a final determination has been made of such persons who have survived and persevered, which fact has not yet been ascertained.

What the Court of Appeals did presume, however, were these two vital factors: (1) That the claims of Al-

varez and Recio are not "true" class action, and consequently, (2) That the rationale used formerly in decisions before Amended Rule 23 be applied to prevent their actions from benefiting by the aggregation of the class's claims.

The Court of Appeals stated that the individual members of the class were each separate claimants rather than a class of plaintiffs who were uniting to enforce a right or title which they held in common. That court in its opinion discussed the following cases in holding as it did that the claims of the classes represented by Alvarez and by Recio could not be aggregated. It is submitted that the reasoning was erroneous.

Lion Bonding & Surety Co. v. Karatz, 262 U.S. 77 (1923), presented the question to this Court whether the plaintiff, an individual creditor of the defendant, had actually demonstrated a common undivided interest with the alleged class members, other individual creditors, that would allow him to aggregate their claims. This Court held that plaintiff's only interest was to have his personal debt paid, (less than the jurisdictional amount); and further, that no common undivided interest was demonstrated by the plaintiff, who stood in the shoes of an unsecured simple contract creditor. *Id.* at 85.

The case of *Pinel v. Pinel*, 240 U.S. 594, (1916), was a contest between the devisees of a testator and two of the testator's children, the children having been omitted entirely from the will. The question certified to this Court was whether the two children, omitted from the will and seeking to establish their title to an undivided interest in the deceased father's realty, could combine their separate claims to satisfy the jurisdictional amount. Naturally,

such a combining of claims was disallowed since the title of each complainant (the omitted children) was separate and distinct from that of the other. *Id.* at 594.

Another early case cited by the court below as authority for denying the aggregation of Petitioners' claims in the Perseverance Fund was *Troy Bank v. Whitehead and Co.*, 222 U.S. 39 (1911). That case involved two assignees who were holders of notes against the same obligor, such notes together totaling the jurisdictional amount. When the obligor defaulted on payment of both notes, the assignees sought relief in federal court, basing jurisdictional amount on their combined claims against the same obligor. This Court *allowed* such an aggregation. Its rationale was that " . . . [w]hen several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Id.* at 39.

The underlying concern of this Court in this entire line of cases is steeped in a primary interest to secure fair representation and just adjudications which would not prejudice the rights of class members who are not parties to the action or the party opposing the class. *Hansberry v. Lee*, 311 U.S. 32 (1946).

The distinction between the aforementioned cases and Petitioners' position is vital: (1) Recio and the members of the class he represents have a secured right to share the proceeds of the Perseverance Fund, the exact amount of which is undetermined at this stage; and (2) an adjudication with regard to the right of any member of the class represented by both Recio and Alvarez creates a disposition that affects *all* the class members, since each share claimed

by each member is a *per capita* share, and hence contingent on the number of claimants.

There should be no inconsistency with regard to the individual claims. Yet, it must be noted that the court below has allowed those persons with claims in excess of $10,000.00 to proceed while denying that right to others. Such random choices could easily lead to inconsistent results. R.84, 85 [#22776].

Comparing those cases cited by the Court of Appeals to other cases which have defined those entitled to aggregate the entire class's claim will present this Court with facts much closer to the case at bar. One of the earliest such cases, preceeding the criticisms of Rule 23 by Moore, Barron, and Holtzoff, yet embodying the rationale espoused by those commentators, is *Shields v. Thomas*, 17 Howell 3 (1855). There, the legal representatives of a decedent alleged misappropriation of the estate by the new husband of the decedent's widow. Though each of the individual representatives' claims, if satisfied, would have fallen short of the jurisdictional amount, this Court allowed the representative of the class to amass the claims of all those persons whom he purported to represent. Their interest was common and undivided, and it was immaterial how the claim was later to be shared. *Id.* at 94. *Shields* described the "true" class action and permitted the aggregation of that class's claims as a vehicle to secure enforcement of their rights.

Another clear statement by this Court of the factors determinative of a "true" class came in *Davies, Collector v. Corbin and others*, 112 U.S. 36 (1884). The question decided by this Court was whether the plaintiffs could seek

enforcement of a tax by aggregating their separate demands in order to qualify for federal jurisdiction. The holding allowed such an aggregation. The facts in *Davies* illustrate a situation wherein the members of a class held a common right, which was acquired separately and individually by those members, to share in a fund being held by another.

In conclusion, it is submitted that Petitioners' position with regard to Respondent adheres to the precedents which define "true" class actions. It should be borne in mind that two actions are here under consideration. The Petitioners in *Recio* seek an adjudication of their claims in the Perseverance Fund; the Petitioners in *Alvarez* seek a declaration of those interests commensurate with their position as stockholders in the Respondent's mutual insurance company. In both instances, Respondent has withheld monies either paid by Petitioners, as in *Recio*, or belonging to Petitioners as an incident of stockholder's rights, as in *Alvarez*.

That one or many or all of the members of each respective class seek a determination of Respondent's right to so withhold does not prejudice the Respondent's due process of law.

Petitioners in the case at bar ought to be allowed to assert the entire rights of their respective classes. The facts here undeniably set forth circumstances that adequately insure the existence of the "true" class situation, amenable as such to the aggregation of the claims of all the class members.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Judgment entered in the above entitled cases on March 27, 1967.

JOSEPH A. McGOWAN
823 City National Bank Bldg.
Miami, Florida 33130

INDEX TO APPENDIX

Page

OPINION OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DENYING RESPONDENT'S MOTION TO DISMISS, MOTION TO STRIKE AND FOR SUMMARY JUDGMENT, APRIL 9, 1965 ..... App. 1

ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DISMISSING CAUSE FOR LACK OF JURISDICTION, MAY 17, 1965 ..... App. 10

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT: *Jose Aramis Alvarez, Individually, and in behalf of all those similarly situated, v. Pan American Life Insurance Company. Augustin Goytisolo Recio, Individually, and in behalf of all those similarly situated v. Pan American Life Insurance Company*, 35 LW 2597 (5th Cir. March 27, 1967) ..... App. 10

"PERSEVERANCE PROVISION" EXCERPT FROM INSURANCE POLICY ISSUED TO AUGUSTIN GOYTISOLO RECIO, DATED NOVEMBER 2, 1942 ..... App. 20

FEDERAL RULE OF CIVIL PROCEDURE 23, AS AMENDED JULY 1, 1966 ..... App. 22

APPENDIX.

OPINION OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DENYING RESPONDENT'S MOTION TO DISMISS, MOTION TO STRIKE AND MOTION FOR SUMMARY JUDGMENT

(Number and title omitted) (Filed: April 9, 1965)

Plaintiff has filed a class suit, the object of which is to impress a trust on funds collected by the Defendant pursuant to insurance contracts with numerous individuals including the Plaintiff.

The Plaintiff is a Cuban citizen, who presently resides in the State of Virginia. The Defendant was incorporated, and maintains its principal place of business in the State of Louisiana.

The Complaint alleges that on November 2, 1942, Defendant issued a life-endowment insurance policy to the Plaintiff in Cuba. The policy contained a "perseverance bonus" clause which provides as follows:

"PERSEVERANCE BONUS"

"In consideration of the application for this contract, which is included in the application for the policy, that being the basis for the issuance of this contract, and in consideration of the annual payment of Two Dollars, as additional premium for the same, which shall be made at the same time and under the same conditions as the regular policy premium,

By this means it is agreed to create and main-

tain a Special Perseverance Fund, separating each year said additional premium of Two Dollars ($2.00) which shall be paid with each renewal of the regular premium that is paid for each Thousand of the Face Value of the insurance on all the policies that shall contain this clause and have been issued during one same year. Said policies shall form a class in themselves.

In addition, it is agreed that said fund shall accumulate at the net rate of interest accrued by the Company on its funds, compounded annually.

In addition, it is agreed that this fund shall be distributed at the end of Twenty years, among the surviving and perseverant individuals of said class in proportion to the amount of Insurances then in force on the life of each Policyholder.

In addition, it is understood and agreed that the portion of each persevering and surviving individual, when said fund is distributed, may be:

(a) Retired in cash.

(b) Applied to the purchase of Paid-Up Insurances, as per the tariffs that the Company shall have in force at the time, providing proofs of good health satisfactory to the Company.

(c) Applied to the purchase of a life annuity, as per the tariffs that the Company shall then have in force.

(d) Left in deposit with the Company, subject to being retired at any time, to be increased at the net rate of interest accrued by the Company on its funds, compounded annually.

The total premium indicated on the first page of the policy includes the additional premium for this Agreement.

Appendix and integral part of Policy No. 368-510 on the life of Agustin Goytisolo Recio issued on the 2nd of November, of 1942.

(Signed) Illigible
Secretary

(Signed) Crawford H. Ellis
President

Countersigned by:

(Signed) Francisca Varela

(THERE ARE THREE SUCH EXACTLY ALIKE AGREEMENTS FORMING PART OF THIS POLICY.)"

Plaintiff alleges that in addition to the policy which Defendant issued to him, that Defendant entered into similar insurance contracts with many others; and that all of said policies, including Plaintiff's, contained the "perseverance bonus" clause; and that Plaintiff and the others similarly situated constitute a class; that the Defendant has on deposit a fund of $6,201,143.16, a proportion of which belongs to the Plaintiff and those in his class; that on November 2, 1962, the Plaintiff and those of his class became entitled to their proportionate share of the fund,

but notwithstanding, the Defendant has refused to recognize the rights of Plaintiff and those in his class under their respective policies.

The Defendant, in response to the complaint has filed motions to dismiss, to strike portions of the complaint, and for summary judgment. In order to consider these motions it is necessary to review the history of the dispute between the parties.

The pleadings and affidavits submitted in this cause reveal that in June of 1961 the Plaintiff inquired of the Defendant about the status of his insurance policy. The Defendant then informed the Plaintiff that it no longer considered itself obligated under the policy in view of certain expropriation decrees of the Cuban government. This reply resulted in the Plaintiff filing on December 15, 1961, an action for a declaratory decree in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County.

In that suit the Plaintiff, here and there, prayed for a declaratory decree which would hold that the Defendant was obligated to the Plaintiff under the terms of the policy. It is significant to note that at the time Plaintiff had filed said suit in the State Court, the endowment and "perseverance bonus" benefits provided by the policy had not matured.

In the State Court the Defendant defended against the allegations made in Plaintiff's Complaint on the sole ground that the Cuban expropriation decrees had eliminated Defendant's obligations under the policy. The State Court entered a summary judgment for the Plaintiff, which judgment was affirmed by the District Court of

Appeals, for the Third District, *Pan American v. Recio, (Fla. App. 1963) 154 So. 2d 197;* thereafter certiorari was denied by both the Florida ((1964) 156 So. 2d 857) and United States Supreme Courts ((1964) 377 U.S. 990).

After the termination of the litigation in the State Court action, the Plaintiff demanded that the Defendant pay to him the endowment and "perseverance bonus" benefits which by that time had matured under the terms of the policy. The Defendant offered the Plaintiff the endowment benefits under the policy, but refused any payment of the "perseverance bonus" benefits.

Upon the Defendant's refusal to acknowledge any liability under the "perseverance bonus" clause, the Plaintiff filed a motion for clarification of final decree in the State Court. In that motion the Plaintiff sought to have the State Court clarify its final decree to reflect the Defendant's liability to the Plaintiff under the "perseverance bonus" clause. However, the State Court denied that motion without opinion on January 4, 1965, after which the Plaintiff filed the instant suit in this Court.

This Court is of the opinion that Plaintiff's right to the "perseverance bonus" benefits was not adjudicated by the State Court. This is true because Plaintiff made no claim for said "perseverance bonus" benefits in that suit; moreover, the "perseverance bonus" benefits had not matured under the policy at the time that suit was instituted.

Therefore, the State Court decree does not preclude this Court from adjudicating the Plaintiff's right, if any, to the "perseverance bonus" benefits under his policy.

In defense of this suit the Defendant contends that the "perseverance bonus" clause is contrary to the law and to public policy of the State of Florida, and that, therefore, this Court should not enforce any right under said clause. In support of this contention the Defendant cites Florida Statute section 627.0228 (1963) which provides as follows:

> "627.0228 Prohibited policy plans
>
> (1) No insurer shall issue policies, certificates or contracts to policyholders or members providing for the grouping of its policyholders or members into groups and divisions, classified according to age, and providing for payment of contingent endowment benefits, by whatever name called, from special funds created for such purpose to the oldest member in seniority of the group or division, or under any other similar plan.
>
> (2) The commissioner shall revoke the certificate of authority of any insurer which violates this section. Any officer or agent of an insurer who violates this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in Section 624.15 of this code."

It is apparent under the above quoted statute, that insurance companies in Florida are prohibited from offering to the public a "perseverance bonus" plan, such as the one involved in this suit. However, said statute does not prohibit the enforcement of rights that may accrue under such

a plan, in insurance policies that are legally issued in other States. Moreover, the rule against enforcement of rights arising out of illegal contracts is not generally applied where the parties are not in pari delicto. See 7 Fla. Jur., *Contracts* Section 69 (1956). It will not be applied here.

Finally, the Defendant contends that the Plaintiff is not entitled to any "perseverance bonus" benefits because the Plaintiff did not pay the premiums on said policy until the end of the "perseverance bonus" period, and because the Plaintiff demanded the cash surrender value of the policy prior to the end of such period. With respect to the defense that the Plaintiff did not pay the premiums on the policy for the full "perseverance bonus" period, the Court is of the opinion that the "Automatic Loans to Avoid Lapsing" clause of the policy applies to the "perseverance bonus" clause and would prevent a forfeiture of the right to the benefits of said "perseverance bonus" clause. The "Automatic Loans to Avoid Lapsing" clause provides as follows:

"AUTOMATIC LOANS TO AVOID LAPSING"

> "If after the premiums for the first three years have been paid, a due premium has not been paid within the thirty days of grace period, it shall be charged to the policy as a loan, with interest in advance at the rate of six per cent per year, providing the cash value of the policy, at the date the premium became due, is at least equal to the amount of said premium and its interest, after any existing loan has been deducted as well as any other debt with its accumulated interests.

If the cash value or the balance of same were not sufficient to pay the entire due premium and interest, it shall be used, if it were sufficient to pay the premium for a shorter period which is not less than three months; but, if it were not sufficient to pay for a three month period of the premium, this policy shall lapse, and any excess of the cash value over the value of the debt shall be applied to purchase term insurance, for a period of time sufficient to cover when applying said excess as net single premium at the last birthday of the assured, in conformity with the norm of the Company.

This condition is automatic, and shall be executed by the Company even if there is no request from the assured. Any indebtedness so created, shall constitute against the policy a credit preferable to any claim from the beneficiary or assignee; and at all times while the policy is protected in this manner, the assured may, without medical examination, resume payment of the premiums, and it will continue in force."

In this connection the record reveals that the total annual premium on the policy in question was $53.51; and that of said amount $2.00 was the annual premium for the "perseverance bonus" benefits. The record also reveals that the Defendant extended an automatic loan to the Plaintiff under the above quoted clause, which loan was in the amount of $53.51. Presumably $2.00 of that amount was to keep the "perseverance bonus" clause from lapsing.

With respect to Defendant's claim that the Plaintiff's

demand for the cash surrender value of the policy amounts to a forfeiture of the "perseverance bonus" benefits, it is noted that the Plaintiff denies that he ever requested the Defendant to send him the cash surrender value of the policy. In any event, the Court notes that there is no provision in the policy which provides for the forfeiture of the "perseverance bonus" benefits upon a "request" for the cash surrender value. The cash surrender value of the policy was not paid to the Plaintiff prior to the termination of the "perseverance bonus" period. Therefore, the Court concludes that a mere "request" for payment of the cash surrender value of the policy, without payment by the insurance company of such amount, would not forfeit any right to the "perseverance bonus" benefits.

For the reasons stated above, it is:

ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendant's Motions to Dismiss, to Strike and for Summary Judgment are severally denied.

2. The Defendant shall have ten (10) days from the date of this Order to answer the Plaintiffs' Complaint.

DONE AND ORDERED at Miami, Florida, this 9 day of April, 1965.

s/ Charles B. Fulton
UNITED STATES DISTRICT JUDGE

ORDER DISMISSING CAUSE FOR LACK OF JURISDICTION

(Number and title omitted) (Filed: May 19, 1965)

This cause came on to be heard on defendant's suggestion of lack of jurisdiction. After hearing argument of counsel and being otherwise duly advised in the premises, it is hereby

CONSIDERED, ORDERED, ADJUDGED and DECREED that the cause should be and the same is hereby DISMISSED for lack of jurisdiction over the subject matter. In view of this order, the disposition of the other pending motions filed by defendant for reconsideration of the Court's prior ruling becomes moot.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, this 17 day of May, 1965.

s/ Charles B. Fulton
UNITED STATES DISTRICT JUDGE.
(March 27, 1967.)

OPINION OF THE USCA 5th Cir., etc.

Before WISDOM, BELL, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: These diversity cases, consolidated for appeal, were brought as class actions under old Rule 23, F.R.Civ. Procedure. Alvarez and Recio claimed relief for themselves and other Cuban refugees similarly situated against appellee, a mutual insurance company. Both actions were dismissed under the diversity statute

for lack of the jurisdictional amount. 28 USCA § 1332. These appeals followed.

We affirm. In so doing we conclude that new Rule 23, adopted July 1, 1966, is applicable to these cases. However, we hold further that this rule is of no avail to appellants as it does not abrogate the well settled principle that separate and distinct claims may not be aggregated to make the jurisdictional amount even in a class action.

Although the cases differ factually, the aggregation principle is dispositive in both cases. Recio owned an insurance contract issued by appellee in the amount of $1,000.00. The Castro government expropriated appellee's assets in Cuba and, for this reason, payment on the contract in question was refused. Recio sued appellee in the Florida state courts and recovered all benefits then due under the contract. His federal suit is based on a claim that a perseverance bonus accrued later under the contract. His suit was for the amount due him, less than three hundred dollars, and such sums as were due other Cuban Nationals holding contracts with similar bonus provisions. The class was said to include more than five thousand such contract holders. The bonus clause required an annual payment of from two to six dollars into a fund to be paid only to those who lived for twenty years, i.e., those who persevered.

Alvarez was the holder of an insurance contract with appellee in the amount of $5,000.00. He sought his contract rights and those of all other Cuban National policyholders similarly situated. He alleged that appellee had denied him all benefits due under the contract including loan and cash surrender values.

Apparently aware of the principle that separate claims may not be aggregated, the tenor of the complaint was directed toward the insurance company assets from which the bonus payments would be made, in the case of Recio; and toward the assets as well as other contract rights such as voting, in the case of Alvarez. Recio alleged a conversion of the perseverance fund, sought the appointment of a receiver, an accounting, and to impress the fund with a trust. He did not specifically seek the sum due him but the record shows without dispute that he had never requested anything more of the insurance company than such sum as might be due him under the bonus plan. We hold that he was seeking the sum due him and such sums as may have been due others of the asserted class similarly situated.

Alvarez alleged a conversion of the total of the sums due all Cuban Nationals in the class, and a refusal to extend voting privileges due under a mutual insurance contract to him and his class. He sought an accounting, and an injunction requiring that appellee re-establish his interest and that of the class on its books, and that all claims be honored. This too was nothing more than a claim on behalf of each contract holder in the class for whatever might be due under the respective contracts.

The separateness of the claims of each contract holder is established by the case of *Troup v. McCart*, 5 Cir., 1956, 238 F.2d 289, a class action, where prayers substantially as these were treated, by giving effect to substance over form, as a prayer for payment of sums due under individual insurance contracts. That case, in turn, rested on *Eberhard v. Northwestern Mutual Life Ins. Co.*, 6 Cir., 1917, 241 Fed. 353; and *Andrews v. Equitable Life Assur. Soc.*,

7 Cir., 1941, 124 F.2d 788, both of which involved prayers of the same nature. These cases all stand for the proposition that rights due under an insurance contract are those of creditor and debtor, and are several and distinct from claims which other contract holders may have against the same insurance company. The claims of the separate contract holders are not related to or dependent upon each other. Each case holds that the separate claims may not be aggregated to make the jurisdictional amount required under the diversity statute, § 1332, *supra*. See also *Matlaw Corporation v. War Damage Corporation*, 7 Cir., 1947, 164 F.2d 281; and *Knowles v. War Damage Corporation*, D.C. Cir., 1948, 171 F.2d 15.

These holdings are in accord with the long line of Supreme Court decisions to the effect that separate and distinct demands of two or more plaintiffs, unlike several plaintiffs uniting to enforce a right or title which they hold in common, may not be aggregated to make the jurisdictional amount. *Lion Bonding & Surety Co. v. Karatz*, 1923, 262 U.S. 77, 43 S.Ct. 480, 67 L.Ed. 871; *Pinel v. Pinel*, 1916, 240 U.S. 594, 36 S.Ct. 416, 60 L.Ed. 817; *Troy Bank v. G. A Whitehead & Company*, 1911, 222 US. 39, 32 S.Ct. 9, 56 L.Ed. 81; *Clay v. Field*, 1891, 138 U.S. 464, 11 S.Ct. 419, 34 L.Ed. 1044; *Stratton v. Jarvis & Brown*, 1834, 8 Peters (33 U.S.) 4, 8 L.Ed. 846. See also *Alfonso v. Hillsborough County Aviation Authority*, 5 Cir., 1962, 308 F.2d 724; and 1 Moore's Federal Practice (2nd ed.), pp. 889-893; 1 Barron & Holtzoff, Federal Practice and Procedure (Wright ed.), pp. 114-117; and 2 Barron & Holtzoff, Federal Practice and Procedure (Wright ed.), pp. 321-324.

Appellants would avoid this jurisdictional obstacle by asserting Rule 23, F.R.Civ.P., as a jurisdictional base in

each case. They properly read old Rule 23 as permitting aggregation if there is a true class action but their contentions that these were such actions were overruled in the District Court. *Alfonso v. Hillsborough County Aviation Authority; Troop v. McCart;* and *Knowles v. War Damage Corporation*, all *supra*, support the District Court in this respect. Each teaches that these were spurious class actions under 23(a)(3); hence aggregation was not in order. We need not dwell on this problem, however, since we are of the view that it would not be inappropriate to apply new Rule 23 and we will apply it *arguendo*. The new rule has discarded the trichotomy developed under the old rule of treating class actions as either true, hybrid, or spurious.

There is a sound basis for applying new Rule 23. On February 28, 1966, the Supreme Court entered its adopting order which included new Rule 23. That order provided in pertinent part:

> "That the foregoing amendments ... to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies. 384 U.S. 1029, 1031 (1966)."[1]

---

1 On the application of the injustice test, cf. *Klapprott v. United States*, 1949, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266.

The Advisory Committee's Note on the new rules, 39 F.R.D. 98, points out that the true category, § 23(a)(1), under old Rule 23[2] was defined as involving joint, or common, or secondary rights; the hybrid category, § 23(a)(2), as involving several rights related to specific property; and the spurious category, § 23(a)(3), as involving rights affected by a common question and related to common relief. The new rule[3] reflects an abandonment of the nature

---

[2]Old Rule 23:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

[3]New Rule 23, (384 U.S. 1039, 1047 (1966) is as follows:

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

of the right concept for a more pragmatic approach. The new rule looks to such practical considerations as common questions of law or fact, the risk of inconsistent adjudications, the desirability of concentrating litigation in a particular forum, and the difficulties to be encountered in managing the action. See Advisory Committee's Note, 39 F.R.D. 98, *supra*; and Cohn, "The New Federal Rules of Civil Procedure", 54 Geo. L.J. 1204, (1966).

Notwithstanding that we have assumed, *arguendo*, that the new rule is applicable, the question of jurisdictional amount still exists unless the new rule has somehow abrogated the aggregation principle. We have found no authority for so holding, and we cannot assume that federal jurisdiction has been expanded in such a *sub silentio* manner. Since the inception of federal diversity jurisdiction, Congress has imposed a jurisdictional amount requirement. In § 11 of the Judiciary Act of 1789, the jurisdiction of the federal courts in diversity cases was limited to controversies in which the amount involved exceeded the sum of $500.00. 1 Stat. 73, 78. In the interim the jurisdictional amount requirement has been continually enlarged to the

---

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

• • •

present amount of $10,000.00.[4] In contrast, it was not until June 19, 1934, that Congress gave the Supreme Court power to enact rules of civil procedure for the federal courts. 28 USCA § 723, now 28 USCA § 2072. Shortly thereafter, the Supreme Court made it clear that the delegation of rule making power to the court did not authorize the expansion or restriction of jurisdiction conferred by statute.[5] This limitation is expressed in Rule 82, F.R. Civ.P. (as amended, effective July 1, 1966), which provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ." 384 U.S. 1029, 1068.

Professor Moore has described the class action as nothing more than ". . . a procedural device to permit some to prosecute or to defend an action without the necessity of all appearing as plaintiffs or defendants." 3 Moore's Federal Practice (2nd ed.), p. 3480. This statement was made in support of his view that the aggregation principle was applicable in full force to class actions brought under old Rule 23. Aggregation was proper, he stated, where the claim was joint or common, as in the true category, but not where there were several or separate claims as in hybrid

---

[4] In 1887 the amount was increased to $2,000, 24 Stat. 552; in 1911 to $3,000, 36 Stat. 1091; and in 1958 diversity jurisdiction was limited to cases where the matter in controversy exceeded the sum of $10,000. 72 Stat. 415.

[5] In *Sibbach v. Wilson & Co.*, 1941, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479, the court said:

> "Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure . . . . There are . . . limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute."

or spurious class suit. This treatise law is in line with the decisions. As examples, in addition to *Alfonso v. Hillsborough County Aviation Authority;* and *Troup v. McCart*, both *supra*, the court in *Steele v. Guaranty Trust Co. of New York*, 2 Cir., 1947, 164 F.2d 387, described a proceeding under Rule 23(a) (3) as "... in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." In *Sturgeon v. Great Lakes Steel Corporation*, 6 Cir., 1944, 143 F.2d 819, a spurious class action, the court pointed out that the class action rule does not broaden the jurisdiction of the federal courts in diversity of citizenship cases, citing old Rule 82, F.R.Civ.P., which provided that the rules were not to be construed to extend or limit the jurisdiction of the District Court. The holding of these cases is no different from that of the Supreme Court in *Clark v. Paul Gray*, 1939, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001, where the court raised the question of jurisdictional amount on its own motion and concluded that only one of several plaintiffs had made a showing of the requisite amount in controversy, and that the jurisdictional amount was necessary in the case of each of the plaintiffs where they asserted separate and distinct demands as distinguished from a joint or common interest in a single suit. The District Court was directed to dismiss as to all plaintiffs, save the one, for want of the jurisdictional amount.

In sum, it would appear that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule making power delegated to the Supreme Court by Congress. It follows that the principle is valid and subsisting notwith-

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1966

No. 22302

D. C. Docket No. CA 65-32-CF

AUGUSTIN GOYTISOLO RECIO, Individually, and in behalf of all those similarly situated,

Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, BELL and GODBOLD, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Augustin Goytisolo Recio, Individually, and in behalf of all those similarly situated, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 27, 1967

Issued as Mandate: APR 18 1967

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1966

No. 22761

D. C. Docket No. 65-2[illegible]-CF-Civil Action

JOSE ARAMIS ALVAREZ, Individually, and in behalf of all those similarly situated,

Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, BELL and GODBOLD, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Jose Aramis Alvarez, Individually, and in behalf of all those similarly situated, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 27, 1967

Issued as Mandate: APR 18 1967

standing new Rule 23.[6] This conclusion is a recognized limitation on the full utility of the class action procedure in federal courts where some members of the class have claims in the jurisdictional amount and some do not. However, the law seems clear and an accommodation of jurisdiction to the class action procedure, if deemed necessary, is a question which addresses itself to the Congress or the Supreme Court.

There is one last matter which should be mentioned. After appellee moved to dismiss the Alvarez case for lack of the jurisdictional amount, Mr. Alvarez called to the court's attention that another member of the class had a contract with appellee in the amount of $25,000. This suggestion is of no help to Mr. Alvarez or the class but it would enable this member of the class, just as was true in *Clark v. Paul Gray, supra*, to maintain his separate action, assuming the necessary amendment in the District Court. As we have noted, where, as here, the claims of the respective members of the class are several and distinct, each must establish the requisite amount for his action to lie. See 1 Barron & Holtzoff, Federal Practice and Procedure, (Wright ed.) pp. 114-117, and 2 Barron and Holtzoff, pp. 321-324. *Cf. Eagle Star Insurance Company v. Maltese*, 5 Cir., 1963, 313 F.2d 778.

The judgment of dismissal in each case, as it relates to a class action, is

AFFIRMED.

---

[6]Cf. caveat in Cohn, The New Federal Rules of Civil Procedure, supra, p. 1221, fn. 73. Professor Wright in the supplement, p. 89, to 2 Barron & Holtzoff, Federal Practice and Procedure (Wright ed.), § 569, entertains the hope that the decision will be otherwise.

PERSEVERANCE BONUS

La Pan-Americana, Companies de Seguros Sobre la Vida
(PAN-AMERICAN LIFE INSURANCE COMPANY)

In consideration of the application for this contract, which is included in the application for the policy, this being the basis for the issuance of this contract, and in consideration of the annual payment of Two Dollars, as additional premium for the same, which shall be made at the same time and under the same conditions as the regular policy premium,

By this means it is agreed to create and maintain a Special Perseverance Fund, separating each year said additional premium of Two Dollars ($2.00) which shall be paid with each renewal of the regular premium that is paid for each Thousand of the Face Value of the insurance on all the policies that shall contain this clause and have been issued during one same year. Said policies shall form a class in themselves.

In addition, it is agreed that said fund shall accumulate at the net rate of interest accrued by the Company on its funds, compounded annually.

In addition, it is agreed that this fund shall be distributed at the end of Twenty years, among the surviving and perseverant individuals of said class in proportion to the amount of Insurances then in force on the life of each Policyholder.

In addition, it is understood and agreed that the portion of each persevering and surviving individual, when said fund is distributed, may be:

(a) Retired in cash.

(b) Applied to the purchase of Paid-up Insurances, as per the tariffs that the Company shall have in force at the time, providing proofs of good health satisfactory to the Company.

(c) Applied to the purchase of a life annuity, as per the tariffs that the Company shall then have in force.

(d) Left in deposit with the Company, subject to being retired at any time, to be increased at the net rate of interest accrued by the Company on its funds, compounded annually.

The total premium indicated on the first page of the policy includes the additional premium for this Agreement.

Appendix and integral part of Policy No. 368-510 on the life of Agustin Goytisolo Recio issued on the 2 of November of 1942.

(Signed) Illegible
Secretary

(Signed) Crawford H. Ellis
President

Countersigned by:
(Signed) Francisco Varela

(THERE ARE THREE SUCH EXACTLY ALIKE AGREEMENTS FORMING PART OF THIS POLICY.)

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make

appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

SUPREME COURT, U.S.
FILED
JUL 14 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 289

JOSE ARAMIS ALVAREZ, Individually, and in behalf of all those similarly situated,
Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

AUGUSTIN GOYTISOLO RECIO, Individually, and in behalf of all those similarly situated,
Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES A. DIXON
900 Dade Federal Building
Miami, Florida 33131
and
SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Respondent.

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2-4
QUESTION PRESENTED	4
STATEMENT OF THE CASE	4-11
Alvarez Case	5-8
Recio Case	8-10
Proceedings In The Court of Appeals	11
REASONS FOR DENYING THE WRIT	11-13
CONCLUSION	13
CERTIFICATE OF SERVICE	14

INDEX OF CASES CITED

	Page
ANDREWS v. EQUITABLE LIFE ASSUR. SOC., (7th Cir.1941), 124 F.2d 788	12
EBERHARD v. NORTHWESTERN MUTUAL LIFE INS. CO., (6th Cir.1917), 241 F. 353	12
PINEL v. PINEL, 240 U.S. 594	12
TROUP v. McCART, (5th Cir.1956), 238 F.2d 289	12

OTHER AUTHORITIES CITED

Amended Rule 23	4, 11
Amended Rule 82	12
Public Law 85-554 [72 Stat. 415]	2-4
1 Stat. 73, 78	12
28 U.S.C., Section 1254(1)	2
28 U.S.C., Section 1332	4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 289

JOSE ARAMIS ALVAREZ, Individually, and in behalf of all those similarly situated,

Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,

Respondent.

AUGUSTIN GOYTISOLO RECIO, Individually, and in behalf of all those similarly situated,

Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to

NOTE: The Recio and Alvarez cases were consolidated in the Court of Appeals below after separate records had been filed. "RR" is used herein for the Recio record and "AR" for the Alvarez record. Unless otherwise indicated, all emphasis is supplied.

review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 375 F.2d 992. This opinion affirms two separate orders of the United States District Court for the Southern District of Florida dismissing both the Recio and Alvarez cases for lack of jurisdiction (RR. 246, AR. 67).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgments of the Court of Appeals were entered on March 27, 1967.

STATUTE INVOLVED

Public Law 85-554[72 Stat. 415] provides in pertinent part:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . .
>
> * * *
>
> Sec. 2. That section 1332 of title 28 of the United States Code is amended to read as follows:
>
> '§1332. Diversity of citizenship; amount in controversy; costs

'(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

'(1) citizens of different States;

'(2) citizens of a State, and foreign states or citizens or subjects thereof; and

'(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

'(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

'(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has a principal place of business.

'(d) The word "States", as used in this sec-

tion, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.'"

QUESTION PRESENTED

Prior to the effective date of Amended Rule 23 of the Federal Rules of Civil Procedure, an insured having an individual claim of less than $10,000 against a mutual insurance company brought a class action against the insurer claiming to represent some five thousand separate policy holders. The action, among other things, sought an accounting, appointment of a receiver and imposition of a trust on all funds allegedly due all five thousand policy holders. The insured claimed the amount in controversy exceeded $10,000. The District Court, holding that the separate claims of separate policy holders could not be aggregated, dismissed the cause for lack of jurisdiction. On appeal and after Amended Rule 23 became effective, the Court of Appeals affirmed, reasoning that while the new rule was applicable, it did not change the principles regarding aggregation of claims of separate claimants to meet the jurisdictional amount requirement of 28 U.S.C. Section 1332. Assuming arguendo that Amended Rule 23 applies, was the Court of Appeals correct in holding that the separate claims could not be aggregated?

STATEMENT OF THE CASE

Each of the petitioners filed separate class actions in the District Court below. Each action was dismissed for want of jurisdiction over the subject matter. Both cases were consolidated in the Court of Appeals below

which affirmed both dismissals. The facts are slightly different in the two cases.

Alvarez Case

Petitioner Alvarez filed a "Class Suit to Impress a Trust and for Other Relief" in the district court below (AR. 1-15). The allegations of the complaint may be summarized as follows:

1. Petitioner is one of some five thousand Cuban nationals who purchased life insurance policies from the respondent Pan-American Life Insurance Company prior to October 24, 1960.

2. Petitioner Alvarez brings the suit "individually, and in behalf of all those similarly situated" (AR. 1) who are "defined as those individuals who are or were the owners of or beneficiaries of policies of insurance issued by the Defendant, and who are or were Cuban Nationals residing in Cuba at the time of issuance of such policies of insurance." (AR. 2).

3. The amount in controversy exceeds ten million dollars, (AR. 2) and "is a fund which belongs to the Plaintiff and other members of the class." (AR. 5).

4. Respondent has "arbitrarily cancelled" all the policies of the members of the class, converted the ten million dollars, and denied the class members "the right to have a voice in the

management and control of the Defendant, a mutual insurance company." (AR. 3-4).

5. The complaint closes with a request for the following relief:

"WHEREFORE, the Plaintiff sues for himself and those similarly situated for:

1. An accounting of all funds in the possession of the Defendant from October 24, 1960, to-date.

2. For an injunction requiring the Defendant to reestablish upon the books of the corporation the interest of the Plaintiffs and requiring the Defendant to honor all claims of the Plaintiffs and members of the class, to pay cash surrender values when requested, to grant loans when requested upon the security of the Plaintiffs' policies, to pay any perseverance bonuses, coupons, dividends, interest, that might be due to the Plaintiffs, to restore voting privileges to the Plaintiff class, and to accept payment of the premiums from the Plaintiff and the members of the class.

3. That the attorneys for the Plaintiffs be awarded an attorneys' fee as provided by law for the establishment of the plaintiffs' interest in the Defendant company.

4. Grant such other and further relief as the Court may deem appropriate." (AR. 5-6).

Attached as an exhibit to the complaint is a "specimen" policy (AR. 6-45), but the complaint is silent as to the terms and conditions of the policy issued to petitioner Alvarez himself. Respondent filed a Motion to Dismiss and Suggestion of Lack of Jurisdiction of Subject Matter (AR. 45), together with an affidavit of its Vice President that petitioner Alvarez's policy was issued:

> " . . . [O]n July 19, 1942 in the amount of $5,000.00. The policy was originally issued as a Dollar contract, however, in 1952 the Insured executed a Monetary Agreement in which it was mutually agreed with the Company that the latter would accept premium payments in Cuban currency in the Republic of Cuba, in lieu of United States Dollar premiums in the City of New Orleans, Louisiana. Furthermore, the Agreement expressly provides that all premiums, benefits and claims payable under the policy will be paid in the national currency of the Republic of Cuba, at the City of Havana, Cuba on the basis of one (1) Peso for each Dollar payable under the contract executed between the Insured and the Company. . . . " (AR. 47-48).

The affidavit goes on to make actuarial computations on the assumption that all events occurred to give the policy its maximum possible value (no one here actually knows what happened when Castro took over). These calculations show that in no event could the policy have been worth more than "Ps. 5,823.27" at the time suit was filed (AR. 49).

After hearing argument and considering the briefs of the parties filed below (AR. 54-64), the district court dismissed the case for want of jurisdiction over the subject matter (AR. 67).

Recio Case

Petitioner Recio filed a "Class Suit To Impress A Trust and for Other Relief" in the district court below (RR. 1-8). The allegations of the complaint may be summarized as follows:

1. Mr. Recio is one of some five thousand Cuban nationals who purchased life insurance policies from the defendant Pan-American Life Insurance Company prior to October 24, 1960. (RR. 2).

2. Mr. Recio brings the suit "for himself and those similarly situated in the class" (RR. 2) who are described as five thousand Cuban nationals who resided in Cuba and purchased contracts of insurance from the defendant prior to October 24, 1960 (RR. 1-12).

3. The amount in controversy exceeds the sum of $10,000.00 (RR. 2) which consists of:

> "... a fund of $6,201,143.16, a portion of which fund, by the very terms of their policies, belong to the Plaintiff and other members of the class in the proportion as defined in their respective contracts of insurance.

9. That on information and belief approximately 20 per cent of the said fund, to-wit: $1,240,228.63 is applicable to the payment of any perseverance bonuses due to the Plaintiff or the members of the class and as such belongs to and is the property of the Plaintiff and all members of the class and is to be held by the Defendant for their use and benefit." (RR. 6).

4. That plaintiff and the other members of the class became entitled to their "proportionate" share of the $1,240,228.63 in 1962, but defendant has refused to pay plaintiff or any other member of the class and has converted the fund to its own use.

5. The complaint closes with a request for the following relief:

"WHEREFORE, The Plaintiff sues for himself and those similarly situated in the class and prays as follows:

1. For the appointment of a receiver to take charge of said fund;

2. For an accounting as to the amount of said fund;

3. For an Order impressing a trust on the said $1,240,228.63 fund, or such other sum as the court may determine, after accounting, be proper;

4. For a judgment against the Defendant for any monies improperly paid or which have been converted to its own use;

5. That the attorneys for the Plaintiff be awarded as attorney's fees a proportionate part from all of the fund hereby sought to be created;

6. That the Court grant such other and further relief as it may deem appropriate." (RR. 7-8).

The policy which was issued to Mr. Recio in 1942, was in the face amount of One Thousand ($1,000.00) Dollars (RR. 59-73). The persistency bonus which can normally and reasonably be expected from such a bonus amounts to less than Five Hundred ($500.00) Dollars (RR. 23). However, in the instant petitioner's case:

> "In the case of policy number 368-510, Augustin Goytisolo Recio, the premiums were not paid to the end of the persistency bonus period, and the demand for cash surrender was made prior to the end of such period. Under these conditions, no persistency bonus payment is due according to the normal practice of the Company. Other policy holders in similar situations would similarly be denied payment." (RR. 18).

After hearing arguments and considering the briefs of the parties below (RR. 241-245), the district court dismissed the case for want of jurisdiction over the subject matter. (RR. 246).

Proceedings In The Court of Appeals

The Alvarez and Recio cases were consolidated in the Court of Appeals which wrote one opinion disposing of both cases. At 375 F.2d 993, the Court of Appeals stated its holding as follows:

> "We affirm. In so doing we conclude that new Rule 23, adopted July 1, 1966, is applicable to these cases. However, we hold further that this rule is of no avail to appellants as it does not abrogate the well settled principle that separate and distinct claims may not be aggregated to make the jurisdictional amount even in a class action."

REASONS FOR DENYING THE WRIT

1. The decision below is not in conflict with any decision of another court of appeals. Petitioners do not cite and our research does not disclose any conflicting decision from any court on the Amended Rule 23 — aggregation issue. The Amended Rules will unquestionably give rise to new decisions on new points of federal practice and procedure. Traditionally, this Court leaves initial determination of these issues to the lower federal courts until a conflict arises warranting resolution by this Court.

2. The decision below is correct and in probable accord with this Court's prior decisions. Since the inception of diversity jurisdiction in 1789 (almost a century and a half before any federal rules of civil procedure), Congress has imposed a jurisdictional amount require-

ment. 1 Stat. 73, 78. The ensuing years have produced countless federal decisions holding that separate claims of separate claimants cannot be aggregated for jurisdictional amount purposes. By 1916, this Court in PINEL v. PINEL, 240 U.S. 594, 596, stated the "settled rule" as follows:

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. . . . "

Under this "settled rule", aggregation of the claims of separate insureds having individual insurance contracts with a mutual insurer has never been permitted. E.g. TROUP v. McCART, (5th Cir.1956), 238 F.2d 289; ANDREWS v. EQUITABLE LIFE ASSUR. SOC., (7th Cir.1941), 124 F.2d 788; and EBERHARD v. NORTHWESTERN MUTUAL LIFE INS. CO., (6th Cir.1917), 241 F. 353.

A holding that the "settled rule" regarding aggregation for jurisdictional amount purposes has been changed by Amended Rule 23 would violate Amended Rule 82 which declares:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . . "

3. The decision below is in accord with the consistently manifest intent of Congress to limit rather than expand federal diversity jurisdiction.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

JAMES A. DIXON

JAMES A. DIXON
900 Dade Federal Building
Miami, Florida 33131

Sam Daniels

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, was mailed to the attorney for the Petitioners, JOSEPH A. McGOWAN, ESQUIRE, 823 City National Bank Building, Miami, Florida 33130, this 14th day of July, 1967.

JAMES A. DIXON